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Supreme Court Of The United States

October Term, 1973

No. 73-1713

ROBERT LEE SMYZER, SR. - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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Supreme Court Of The United States

October Term, 1973

No.

ROBERT LEE SMYZER, SR. *Petitioner*

versus

COMMONWEALTH OF KENTUCKY *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The Petitioner, Robert Lee Smyzer, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky affirming the conviction of the Petitioner by the Jefferson Circuit Court at Louisville, Kentucky.

OPINIONS BELOW

The Trial Court rendered no written opinion in this case. The opinion of the Court of Appeals of Kentucky was a memorandum opinion, not to be cited as authority, which will not be reported. It is printed in the Appendix to this petition at pages 1a-3a. The mandate of the Court of Appeals of Kentucky denying the Petitioner's motion for rehearing appears in the Appendix at page 4a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on November 23, 1973. A timely petition for

rehearing was denied on February 15, 1974. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. A. Whether the Petitioner was denied his Sixth Amendment Right to confront the witnesses against him, when the Commonwealth's Attorney made statements in his closing argument which had the effect of making him a witness against the Petitioner.

B. Whether the Petitioner was denied his Fifth and Fourteenth Amendment Due Process Rights to a Fair Trial by actions of the Commonwealth Attorney which were calculated to, and had the effect of, prejudicing the jury against the Petitioner.

II. Whether the Petitioner was Denied His Constitutional Right to be Present at Every Stage of the Trial Under Due Process of Law When the Jury's Request for Additional Evidence was Denied Without the Jury Being Conducted into Open Court and Without Notice of the Request Being Given to Either the Petitioner or His Counsel?

CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person

be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Robert Lee Smyzer, Sr., was employed as a janitor by the B. F. Goodrich Company in

Jefferson County, Kentucky. He reported for work at the plant on Bells Lane at 7:30 a.m. on June 21, 1972. After punching the time clock he walked over to Building 132 where a safety meeting was in progress. While there, he spoke to several of the men present. Arthur Sands, the deceased, was also attending the meeting.

When Sands stood up at the end of the meeting, Smyzer simultaneously reached his hand out to him and asked him how he was doing. According to the testimony of Smyzer, Sands jerked his hand back and said, "Don't touch me, MF." and "Get out of my face" (T.E. 83). On hearing these remarks, Smyzer testified that he wanted to know if Sands felt that he had done anything to Sands which would cause this hostile reaction. He said that because he feared Sands, he wanted to find out what was on Sands' mind, and for that reason, continued to talk with Sands as he walked with him around to the door where the deceased was fatally wounded.

Smyzer further stated at the trial that when he and Sands reached the door he told Sands that he did not want any trouble and Sands replied, "Get the hell out of my face. You better fear me" (T.E. 85). Smyzer said that Sands reached for his pocket and he (Smyzer) then pulled a knife from his back pocket and cut Sands, as the deceased walked into him, feeling that Sands was going to cut him. Smyzer knew that Sands regularly carried at least one knife and had even seen him demonstrate his ability to pull out a hook bill knife and snap it open.

Smyzer and Sands were alone during their brief conversation prior to the cutting at the door. Two witnesses to the incident, James Dye and Larry E. Meriwether,

saw Smyzer cut Sands, but did not hear the conversation preceding the fatal wounding.

Following the cutting of Sands, Smyzer moved toward the Security Guard shack shouting that he needed help, that he had cut Sands. A fellow employee, Conway Dooley, came up to Smyzer and advised him to go home. Dooley then accompanied him to the parking lot to aid him in locating his car. Smyzer drove to his home where he called his relatives to tell them what had happened.

Two police detectives arrived at the plant at approximately 8:30 a.m., followed by William Anderson, Chief Deputy Coroner for Louisville and Jefferson County. Coroner Anderson testified that he removed two knives from the pocket of the deceased in the presence of one of the detectives.

Two police officers went to petitioner's home, where they found him sitting on the front porch. Smyzer approached the police car, got into the car, and was taken by the officers to another location and transferred into the custody of Sergeant Yeager of the Jefferson County Police Department. Sergeant Yeager then took Petitioner to Police Headquarters, where Smyzer made an oral statement that he thought Sands was reaching for his knife and he had cut him first in self-defense (T.E. 42). Mr. Grantz, co-counsel for petitioner, was called, and advised him that it was all right to give a written statement. A sworn statement was then given by Smyzer.

In August, 1972, the Jefferson County Grand Jury returned an indictment against Robert Lee Smyzer, Sr., charging him with the wilful murder of a fellow

employee, Arthur L. Sands, by cutting his throat. The petitioner entered a plea of not guilty and the trial began on February 26, 1973, and lasted for two days.

The initial federal questions posed by the petitioner pertain to the closing argument of the Commonwealth's Attorney. The Commonwealth Attorney committed several errors which have been held to be reversible errors in certain circumstances by the Court of Appeals of Kentucky. The improper conduct of the Commonwealth's Attorney consisted of making statements which informed the jury that if they imposed the sentence of life imprisonment, it would be with the benefit of parole (Appendix, p. 5a); commenting upon a photograph that had been excluded by the trial court because it was too gory with the obvious effect of bringing the evidence indirectly before the jury (Appendix, p. 8a); and intentionally dropping certain objects to the floor which had not been introduced into evidence and which were calculated to, and did, prejudice the jury (Appendix, pp. 12a-13a). These actions were properly objected to at trial and were complained of and argued individually on appeal as reversible error. In conclusion the Petitioner argued that these actions had the cumulative effect of denying the Petitioner his right to a fair trial.

The Commonwealth's Attorney also made a statement that if the jury did not have sufficient evidence to convict the Petitioner, the jurors should hang the jury because the Commonwealth had more evidence which could have been introduced (Appendix, p. 11a-12a). Petitioner objected to this statement and sought to have the jury discharged. In the Appellate brief, the

petitioner argued that this statement violated his Sixth Amendment Right to Confront the witnesses against him. The Court of Appeals summarily dismissed these contentions based on the summation, as not amounting to prejudicial or reversible error.

At the conclusion of the closing arguments the jury began their deliberations. During the deliberations, the jury requested an affidavit which they believed was the only supportive evidence presented to substantiate the Petitioner's fear of the deceased. This fact was established during a phone conversation between one of the jurors and chief defense counsel after the conclusion of the trial. The tape was played for the trial judge at the hearing on the motion for new trial less than one week after the phone call. However, the trial judge denied the motion for new trial (Appendix, p. 22a). While it is not clear whether the judge denied the request or whether the bailiff usurped the power of the judge and denied it himself, the defense was not informed of this request and had no opportunity to respond to it. Therefore, Petitioner argued on appeal that he was denied his Constitutional right to be present at every step of the trial as recognized in the Commonwealth under *Lett* v. *Commonwealth*, 284 Ky. 267, 144 S.W.2d 505 (1940). In spite of the fact that the motion for new trial had already been made at the time of the phone call and that the first appropriate moment for raising the issue was the hearing on the motion, the Court of Appeals of Kentucky ruled that this ground for new trial had not been properly pursued without reaching the substance of the issue (Appendix, pp. 2a-3a).

After lengthy deliberation, the jury returned a verdict finding the petitioner guilty of wilful murder and

fixed the punishment at life in the penitentiary. A timely motion for new trial was filed detailing the grounds upon which the trial court should have set aside the verdict. At the conclusion of the above mentioned hearing on the motion, the trial judge overruled the motion and sentenced the Petitioner to serve a period of life in the penitentiary on May 29, 1973. The state appeal followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRING PROBLEM CONCERNING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF PROSECUTORIAL ARGUMENT IN THE FACE OF THE CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION AND FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

A. The Sixth Amendment to the Constitution of the United States guarantees a defendant the right to confront the witnesses against him. This has been extended to the states through the Fourteenth Amendment by the case of *Pointer* v. *Texas*, 380 U.S. 400 (1965). The Petitioner's Sixth Amendment right to confront the witnesses against him was violated in this case when the Commonwealth's Attorney made statements which had the effect of introducing evidence against the Petitioner and making him a witness for the prosecution. In his closing argument, the prosecutor advised the jury that there was more evidence that he could have introduced which would make the case against the Petitioner even stronger. He then suggested that if the jury felt that they needed more evidence, they should hang the verdict and he would then try it again.

"Now, I realize I've got to convince every one of you of that, all 12 of you. And it might be you will say, "Well, Mr. Wooldridge, yesterday you told us about a lot of witnesses and some of the witnesses you didn't produce. And what about these knives in the pocket? Shouldn't you have put all the witnesses on? Shouldn't you have had the mother come in and bring the knives and things that were in his pocket? Wouldn't that have helped us? Shouldn't you have subpoenaed some of the people that worked with both of them? Maybe it would have helped us to really see what both gentlemen's reputations were. Maybe you didn't prepare this case as well as you should.' Well, maybe one or two of you, or all of you, could feel that way. 'It's a serious case, Mr. Wooldridge, and we think we should have more proof than what you presented to us.'

"If you feel that way then, of course, we will have what we call a hung jury, if all 12 of you don't agree on it. And I say to you if you honestly feel that way, you think I could have done a better job, you think that in this serious case that involves life in the penitentiary, that the jurors should have more information, then I will try it again. I am here full time, been here nine years, and I'm going to be here as long as I can trying cases. I don't mind trying it again.

"I don't think—you know, in preparing this case I didn't think I needed any more than what I have; the two eye witnesses and his statement admitting the crime. But if you think so why, of course, I will be glad to accommodate you." (Appendix pp. 11a-12a)

This above quoted statement was an obvious attempt to lead the jurors to believe that there was more

evidence against the Petitioner. Thus, the Commonwealth's attorney becomes a witness introducing this non-specific evidence which counsel for the Petitioner had no opportunity to challenge. Not only is the Commonwealth's attorney attempting to bolster the evidence he has already introduced by bringing other evidence into the minds of the jurors, he is also attempting to foreclose any possibility of a verdict of acquittal. He suggests only two alternatives; either convict or hang the jury. He clearly implies that a verdict of acquittal would be grieviously wrong because of damning evidence not introduced. We harbor no naive notions about this prosecutor's interest in justice being served. We can conceive of no other reason for the inclusion of such a statement in the prosecution's closing argument. It is an obvious and gross attempt to introduce other evidence and prejudice the jury.

It is well established that the prosecutor can become a witness and thus violate the Sixth Amendment rights of a defendant. By commenting on possible evidence not having been introduced and within only his own personal knowledge, the Commonwealth's attorney essentially stated new facts to the jury, and in effect, became a witness as to those facts. Such testimony was unsworn and not subject to cross-examination, thus violating the Sixth Amendment rights of the Petitioner. The prosecutor has no right to make statements in his argument based upon matters within his personal knowledge. As the Court of Appeals for the Ninth Circuit said in *Taliaferro* v. *United States*, 47 F.2d 699 (CA9 1931):

> "Cases are to be decided by juries upon the evidence, and when the evidence is offered by

> witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not."

A long line of cases in Kentucky establishes the rule that counsel must confine himself to the facts in the record during argument and that deliberate excursions beyond the record which are calculated to influence the jury constitute reversible error. *Louisville & N. R. Co.* v. *Gregory*, 284 Ky. 297, 144 S.W.2d 519 (1940); *Bowling* v. *Commonwealth*, Ky., 279 S.W.2d 23 (1955); *Hurst* v. *Williams*, Ky., 102 S.W.1176 (1907); *Gunterman* v. *Cleaver*, 204 Ky. 113, 263 S.W. 683 (1924); *Caudill* v. *Commonwealth*, 239 Ky., 712, 40 S.W.2d 334 (1931); *Sexton* v. *Commonwealth*, Ky., 200 S.W.2d 290 (1947); *Triplett* v. *Napier*, Ky., 286 S.W.2d 87 (1955); *Jones* v. *Commonwealth*, Ky., 281 S.W.2d 920 (1955).

Kentucky is one of the few jurisdictions that has considered prosecutorial comments on evidence outside the record in terms of the right to confrontation. In *Turpin* v. *Commonwealth*, 140 Ky. 244, 130 S.W. 1086 (1910), the Court held that where the Commonwealth's attorney had introduced the fact that one of the jurors had been fixed, the defendant had the right to have him sworn and cross-examined. The Court held the denial of these rights to be grave error saying:

> "Whatever our opinion might be as to his guilt, and however this court may sympathize with the purpose of the learned trial judge, and applaud his zeal in endeavoring to protect the trial from improper influence from without, we cannot pass over so grave an offense against the plainest, as well as most valuable right of a man charged with crime, a right equally valuable to the public, which is the guaranty of a fair trial, upon legal evidence only, and face to face with the witnesses who constitute his accusers."

In spite of the conclusions of the Court of Appeals of Kentucky, the case law in this state holds such conduct to be reversible error and in violation of the Defendant's right to confrontation. This presents a clear problem of error having Constitutional dimensions.

Whenever prosecutorial injections of extrinsic evidence exist, grave questions concerning the fair administration of justice under the Constitution arise. We contend that the Court should rule this to be error of Constitutional dimensions. Under authority of *Chapman* v. *California*, 386 U.S. 18 (1967), when error involving the denial of a federal constitutional right occurs, the reviewing Court must be satisfied beyond a reasonable doubt that such error did not contribute to the defendant's conviction. The error in the Petitioner's trial was not considered under such a standard in the decision below (Appendix, pp. 1a-2a).

Therefore, we respectfully maintain that this Court should take up the petition in order to rule that questions of violations of the Sixth Amendment right to confrontation by prosecutorial statements be adjudged under the reasonable doubt standard of *Chapman*, and

as an opportunity to rectify the substantial Constitutional error below by reversing the conviction of the Petitioner.

B. The Commonwealth Attorney committed several errors during his summation to the jury which had the cumulative effect of denying the Petitioner his Constitutional right to a Fair Trial as guaranteed by the Due Process clause of the Fifth and Fourteenth Amendments. In each instance the improper conduct engaged in by the Commonwealth Attorney was error which the Court of Appeals of Kentucky has held to be grounds for reversal on many occasions.

Initially, the improper conduct consisted of a statement which had the calculated effect of informing the jury that if they imposed the sentence of life imprisonment, it would be with the benefit of parole.

> "Now, as you probably also know there's only one crime in Kentucky that you can give more punishment for than murder, and that's rape; rape you can get life without parole." (Appendix p. 5a)

The mention of parole by counsel in argument before the jury has often been found to constitute prejudicial error in Kentucky. *Estepp* v. *Commonwealth*, 185 Ky. 156, 214 S.W. 891 (1919); *Broyles* v. *Commonwealth*, Ky., 267 S.W.2d 73 (1954); *Ringo* v. *Commonwealth*, Ky., 346 S.W.2d 21 (1961); *Brown* v. *Commonwealth*, Ky.,445 S.W.2d 845 (1969). When the jury has some doubt about the Defendant's guilt, information given to the jury about parole may influence them to find him guilty on the theory that he would only serve a few years, whereas, if they had to consider a sentence of life imprisonment without knowledge of parole they would

take their doubts more seriously. Knowledge that the defendant will be paroled at a later date may actually influence the jury to impose a more severe sentence.

In the Petitioner's case, if the jury had not been informed of the possibility of parole they may have considered the evidence introduced to establish self defense more seriously, and failed to convict the Petitioner. The prejudicial effect of the injection of the idea of parole into the mind of the jurors is obvious.

Second, the Commonwealth Attorney commented upon a photograph of the deceased which had been specifically excluded by the judge because of its possible inflammatory effect upon the jury. (Appendix p. 8a) It is a basic rule of law that comment by counsel on evidence excluded by the Court is improper conduct. The Court of Appeals of Kentucky has adopted a harsh view toward such tactics in ruling that this type of conduct constitutes reversible error. In *Rucker* v. *Clark,* Ky., 239 S.W.2d 80 (1951) the Court said: "one will not be permitted by indirect means to acquaint the jury with facts he is not allowed to bring to its notice by direct evidence". In *Commonwealth, Department of Highways* v. *Dowdy,* 388 S.W.2d 593 (1965), the Court stated the reason for the rule:

> "Undue reference to incompetent evidence, though agreeing that it is incompetent, brings the improper evidence to the minds of the jurors as vividly as if affirmatively argued."

In the case of *McDaniel* v. *Commonwealth,* 227 Ky. 824, 127 S.W.2d 866 (1939), where the prosecutor made persistent attempts to ask a question the judge had ruled incompetent, the Court discussed the effect in

terms of the defendant's right to a fair trial saying:

> "It appears to us the Commonwealth Attorney made a deliberate and persistent attempt to bring to the attention of the jury evidence he knew was incompetent, and which was highly prejudicial to appellant's right to a fair and impartial trial. A commonwealth attorney should not forget he is an officer of the court and should never attempt to deliberately bring before the jury evidence he knows is incompetent or to get before the jury by an indirect method evidence which the court has excluded."

The statement of the Commonwealth attorney was purposely made in an effort to bring the excluded photograph to the minds of the jurors and produce an effect equivalent to actually viewing the picture. The prejudicial effect of the photograph and the reference thereto, was such that would infringe on the Petitioner's right to a fair trial.

Third, at the conclusion of the summation the Commonwealth Attorney dropped two pocket knives, several sticks of wood and a bottle of pills to the floor in the plain view of the jurors (Appendix 13a). These objects had not been introduced into evidence. Their exhibition was an obvious attempt by the prosecutor to prejudice the jury against the Petitioner. The Commonwealth Attorney was attempting to leave in the minds of the jurors a picture of the deceased as an unfortunate man who suffered from a sleeping sickness and took medication and whittled in order to stay awake while working. The use of demonstrative evidence during summation which has not been properly introduced and which is calculated to prejudice the jury has been held to be

reversible error in Kentucky; *Rowe* v. *Commonwealth*, Ky., 269 S.W.2d 247 (1954); *Bergman* v. *Solomon*, 143 Ky. 581, 136 S.W. 1010 (1911).

This type of conduct is a fraud on the criminal justice system. Under these circumstances it is difficult to see how the jury could have reached an impartial verdict devoid of prejudice against the Petitioner.

The cumulative effect of these three instances of improper prosecutorial conduct, in conjunction with the highly prejudicial statement to the jury regarding evidence not offered at trial already discussed, was such that it put the ability of the Petitioner to obtain a fair trial in great jeopardy. This Court has held that a fair trial in a fair tribunal is a basic requirement of Due Process. *In re Murchison*, 349 U.S. 133 (1955). Prosecutorial conduct such as occurred in this case presents a significant and widely recognized danger to the fair administration of criminal justice. In far too many cases the prosecutor plays the role of a trial advocate interested first and foremost in securing a conviction. Thus we experience a reluctance on the side of the government to allow the evidence to stand alone without the injection of extraneous prejudicial matters. The conduct of the Commonwealth Attorney here and of prosecutors in far too many other cases, is in conflict with the prosecutor's role as outlined by this Court in *Berger* v. *United States*, 295 U.S. 78 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice

> shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.
>
> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

We can perceive of no reason why a prosecutor should be allowed to proceed with a subtle plan to introduce prejudicial evidence with the obvious intent to influence the verdict under the mere shadow of the harmless error rule which places the burden of showing prejudice upon the Defendant. The inequity of this rule is especially apparent when we consider the obvious advantage already enjoyed by the prosecutor deriving from his position as representative of the government. The Court of Appeals for the Fifth Circuit recognized this advantage in *Latham* v. *United States,* 226 F. 420 (1915) when it said:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharing an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments

and statements to the testimony of the witnesses, in order that no right of the defendant is violated."

The Petitioner maintains that the prosecutor should be presumed to know the case law of his jurisdiction regarding improper conduct constituting prejudicial error. Thus, whenever the prosecutor commits error held to be prejudicial in his jurisdiction, the error should be considered as creating a federal Constitutional question under Due Process of Law.

Therefore, the Petitioner respectfully submits that the Court should take up the Petition in order to reverse the conviction below because the Petitioner was deprived of a fair trial, and also, in order to rule that where the prosecutor has committed multiple prejudicial errors which foreclose the ability of the defendant to obtain a fair trial, the error involves a federal Constitutional question under Due Process of Law. Thus an Appellate Court would have to be satisfied beyond a reasonable doubt that no prejudicial error occurred before affirming the conviction in accordance with the standard promulgated by this Court in *Chapman* v. *California*, supra.

II. THE DENIAL OF THE JURY'S REQUEST FOR EVIDENCE DURING DELIBERATION IN THE PETITIONER'S CASE WITHOUT THE OPPORTUNITY TO BE PRESENT AT THIS STAGE OF THE TRIAL PRESENTS A SUBSTANTIAL QUESTION CONCERNING THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE, THE CONSTITUTIONAL EFFECT OF WHICH IS IN CONFLICT AMONG THE VARIOUS FEDERAL AND STATE JURISDICTIONS.

At the trial of this case, counsel for the Petitioner had his co-counsel read to the jury an affidavit stating

what an absent witness would testify to had he been available to be present at the trial.[1] Later, during their deliberation, the jury requested that they be allowed to have the affidavit. The request was denied, although it is not clear from a reading of either the transcript of the Hearing, Motion for New Trial, March 16, 1973 (Appendix p. 14a) or the transcript of the Hearing, Motion for New Trial, March 29, 1973 (Appendix p. 19a) whether the denial came from the trial judge via the bailiff or merely was made by the bailiff acting beyond his authority as custodian of the jury.

However, there is no question that neither the Petitioner nor his counsel were notified of the jury's request and that the jury was not conducted into open court for a consideration of the merits of their request as provided for in KRS 29.304.[2] Counsel for the Petitioner did not learn that the jury had asked for the affidavit and it had been denied to them until after he had filed his motion for new trial. Approximately one week before

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[1] Transcript of Evidence, p. 70:
MR. GRANTZ: "Comes the affiant, Robert Lee Smyzer, and states that if Ray Booker were present he would testify as follows:
"That Ray Booker was employed at B. F. Goodrich Company and knew the reputation of Arthur Sands for peacefulness and quietude, that this reputation was bad. He knew of these traits personnally from observation and from hearing other men talk about Sands and his reputation and acts.
"Ray Booker saw Arthur Sands 357 Magnum gun and knife and other times several knives, which he continually sharpened. Arthur Sands one night while driving his auto said if police officers who were in auto behind him stopped him he would shoot them. Booker was a passenger in auto." Signed Robert L. Smyzer, Sr., 19 February 1973, Notary Public—attested by Kenny Grantz, Notary."

[2] KRS 29.304 Manner of giving information on law or evidence after submission.
"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their counsel."

the March 16 Hearing On the Motion for New Trial, counsel became aware of the request through a phone conversation with one of the jurors. He made a tape recording of the conversation and filed it with the trial court at the Hearing, Motion for New Trial, March 16, 1973 (Appendix p. 16a), as supportive of an additional ground for new trial, that being the denial of the jury's request for the affidavit. [The relevant portion of the tape recording is set out below (Appendix pp. 18a-19a)]:

> MR. McGEE: (Interrupting) Very definitely. One thing that troubled me, and I felt maybe—I sort of faulted you for it—was the fact that the deposition that was read by—you know, your associate—
>
> MR. HADDAD: (Interrupting) Uh huh.
>
> MR. McGEE: (Continuing) —on the stand, we felt that was the only supportive evidence that had been presented to substantiate his fears.
>
> MR. HADDAD: Uh huh.
>
> MR. McGEE: And it wasn't entered as evidence. And we asked for them to send it in and they wouldn't, of course.
>
> MR. HADDAD: Oh, they would not send that back there?
>
> MR. McGEE: No, they said it was never entered in evidence and we couldn't have it.
>
> MR. HADDAD: Well, that was wrong, it was entered as evidence.
>
> MR. McGEE: Well, they told us—the bailiff told us no, that we couldn't have that, that was not entered as evidence by anybody. And that really kind of disturbed us.
>
> MR. HADDAD: Oh.
>
> MR. McGEE: Because it was the only supportive thing. Because if we had of had that, and it said

what I thought it said, we'd still be there as far as I'm concerned.

MR. HADDAD: Yeah. Isn't that terrible. That bailiff should have come out and reported that to the Court, and he didn't do it.

MR. McGEE: Well, I really don't think that he did. I'm not accusing the man of anything or—

The Court of Appeals of Kentucky rendered an opinion in this case in which it failed to reach the substance of Petitioner's argument that one charged with a felony has the right to be present and heard either by himself or his counsel at every step in the progress of the trial. *Lett* v. *Commonwealth,* 284 Ky. 267, 144 S.W.2d 505 (1940). The court attempted to justify side-stepping the merits of the argument by arbitrarily concluding that counsel had been untimely in raising the ground at the trial level (Appendix pp. 2a-3a):

> "It is the opinion of this court that to invoke the serious action of setting aside a conviction of murder, greater diligence and effort was required."

We agree that setting aside a conviction of murder is a serious action, but it is also a serious action to deny Petitioner his constitutional right to a fair and impartial trial. Counsel did not have an opportunity to raise the ground at an earlier point in time. He did not learn of the request until after the termination of the trial and following his filing the motion for new trial. Further, counsel for the Petitioner knew that a hearing on the motion for new trial was forthcoming in a week and felt that this would be the earliest appropriate time at which to apprise the trial court of the error.

We, therefore, ask this Court to determine the merits of the issue of whether the Petitioner was denied his con-

stitutional right to be present at every stage of the trial under due process of law, guaranteed by the Fifth and Fourteenth Amendments, when the jury's request for additional evidence during deliberation was denied without the jury being conducted into open court and without notice of the request being given to either the Petitioner or his counsel. The Petitioner feels that if the Petition for Writ of Certiorari is granted in this case, this Court would be afforded an opportunity not only to correct the injustice done to Petitioner below, but also to set forth a clear standard in the realm of the fair administration of criminal justice. Such a standard is in dire need of being laid down as is illustrated by the conflicting decisions in various federal and state jurisdictions regarding what circumstances require a conviction to be set aside when there are communications between the court, or some third party, and the jury in the absence of the defendant.

There is no doubt that communications of the type referred to above are improper. This Court has made that point clear in *Shields* v. *United States*, 273 U.S. 583 (1927). But, it also seems implicit in that case that not only are communications between the court and the jury in the absence of and without notice to the defendant improper, but they constitute reversible error without a showing of prejudice by the defendant. The opinion seems to imply a feeling on the part of the Court that these types of communications are inherently subject to resulting prejudice and therefore, the defendant must be present until the jury is discharged following the rendering of a verdict. The Court in *Shields* reversed without exploring the question of whether the defendant had

been prejudiced, but looking only at the fact that notes had been exchanged between the trial court and the jury without the defendant being present. See also *Evans* v. *United States*, 284 F.2d 393 (C.A. 6 1960), where no showing of prejudice was required.

Although the Petitioner feels that communications with the jury in the absence of the defendant are violative of due process without the showing of prejudice because the right to be present at all stages of the trial is a basic constitutional right, the majority view is somewhat different. The majority view on the consequences of communications between the court, or some third person, and the jury appears to be that where the communication is a part of the record or the details of what was communicated are definitely known, the verdict will not be set aside if the content of the communication is made to appear harmless. This view seems to date back from the decision rendered by the Supreme Court many years prior to *Shields*, supra., in *Mattox* v. *United States*, 146 U.S. 140 (1892). A number of jurisdictions follow the standard that the harmless error rule should be applied to communications between the trial court, or a third party, and the jury. See *United States* v. *Schor*, 418 F.2d 26 (C.A. 2 1969); *United States* v. *Crutcher*, 405 F.2d 239 (C.A. 2 1968). In any event, if the test be that such communications, when the content of them is a part of the record or definitely ascertainable, are to be adjudged according to the harmless error rule, it is necessary that they be determined "harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18 (1967).

If this Court were to grant the Writ of Certiorari and adopt the standard that communications in the absence

of the defendant between the court, or some third party, and the jury were to be determined reversible error only if found to be so after the application of the harmless error rule, then the Petitioner's case must also be reversed as it would if the standard was automatic reversal not requiring an examination of prejudice as to the defendant. There is nothing contained in the record in this case to show that the Prosecution even made an attempt to show that the communication with the jury was harmless. See *Rice* v. *United States,* 356 F.2d 709 (C.A. 6 1966). Further, the tape recording of the phone conversation with the juror and counsel for the Petitioner strongly indicates that the bailiff's communication with the jury was prejudicial to the Petitioner and not falling within the category of harmless error beyond a reasonable doubt. *Chapman,* supra. That portion of the communication recalled by the juror and verbalized to counsel for the Petitioner illustrates the probability that the jury gave less weight to the content of the affidavit, and perhaps none at all, as a result of the communication with the bailiff (Appendix p. 19a).

Thus far we have discussed communications with the jury in the absence of the defendant where the content of the communication is either a matter of record or known from some other source. However, circumstances may be such that one cannot be sure of precisely what was said to the jury; the communication is not in the record or was delivered through a third party such as the bailiff in this case. When this situation occurs there must be a reversal. This Court in *Remmer* v. *United States,* 347 U.S. 227 (1954), reversed saying:

> ". . . we do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless."

We maintain that the communications with the jury in this case require reversal because the record does not contain the actual content of the bailiff's communication and the only knowledge that Petitioner's counsel has of it is what the juror recalled several days after the trial. This Court cannot be sure that the juror's recollection is fully complete or correct. The only fact that is certain is that the communication did occur.

While we believe that this case should be reversed because the Petitioner was denied his due process right to be present at every stage of the trial, and that the constitutional error here is reversible error under any of the standards discussed above, we sincerely urge this Court to grant the Petition for Writ of Certiorari in order to provide certainty as to the procedure that courts throughout the United States should employ when juries request a review of certain testimony or other evidence during their deliberations. The setting of a clear standard in this area of the criminal law would certainly promote the fair administration of criminal justice. One standard which should be considered and which we believe is most in line with the right to due process of law is that formulated by the American Bar Association. See ABA, *Project on Minimum Standards for Criminal Justice*, Trial by Jury §5.2(a) and

Commentary (Approved Draft 1971).[3]

We ask this Court to grant the Petitioner's Writ of Certiorari in order to reaffirm the principles of *Shields* v. *United States* and make clear that criminal defendants will be afforded their rights to due process of law in a just and fair manner.

CONCLUSION

The Petitioner's Fifth and Fourteenth Amendment right to Due Process of Law was denied by the actions of the Commonwealth attorney during his closing argument which foreclosed the Petitioner's ability to obtain a fair trial.

The Petitioner's Sixth Amendment right to confront the witnesses against him was violated when the Commonwealth attorney made statements which had the effect of making him a witness for the prosecution.

We respectfully submit that the Court should take up the Petition because the above actions present an example of a significant and recurring problem concerning the permissible scope of the prosecutor's behavior in the face of every criminal defendant's Constitutional right to a fair trial and to confront the witness against him.

The Petitioner was also denied his Constitutional right to be present at every stage of trial under Due Process of Law when the jury's request for evidence dur-

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[3] Trial by Jury, §5.2.
(a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence.

ing deliberation was denied without notice to the Petitioner or opportunity to be heard.

We respectfully submit that the Court should take up the Petition because the denial of the jury's request herein presents a substantial question for the fair administration of criminal justice and because the Constitutional effect of such denial is in conflict among the various federal and state jurisdictions.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

Of Counsel:
Kenny Grantz

APPENDIX

APPENDIX

Rendered:
November 23, 1973

COURT OF APPEALS OF KENTUCKY
No. 73-438

ROBERT LEE SMYZER, SR. *Appellant*

v.

COMMONWEALTH OF KENTUCKY *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, 2ND DIVISION
HONORABLE JOHN P. HAYES, JUDGE
No. 147724

MEMORANDUM OPINION OF THE COURT BY COMMISSIONER CULLEN AFFIRMING

(Not to be cited as authority)

It is the opinion of the Court that there is no substantial probability that prejudice resulted from various parts of the prosecuting attorney's closing argument. The indirect reference to parole was not likely to have been construed by the jury as a suggestion that it would be all right to convict the defendant, even if the jury had doubts, because the life sentence could be reduced through parole. The statement that the Commonwealth had taken a picture of the deceased victim that was "so gory" that it couldn't be introduced was not calculated to inflame the jury, since the mere word "gory" was not of an inflammatory nature such as would be the picture itself. The remarks with reference to the prosecuting attorney's willingness to try the case over again if the jury thought he hadn't produced enough evidence could be

construed as implying that the Commonwealth had more evidence of guilt than it had introduced, but we think such a construction would be a strained one not likely to have been made by the jury. The court does not consider that the statement and remarks above mentioned constituted the giving of material testimony by the prosecuting attorney such as to be a violation of the right of the defendant, under Section 11 of the Kentucky Constitution and the Sixth Amendment to the U.S. Constitution, to be confronted by the witnesses against him.

The court is of the opinion that the act of the prosecuting attorney (whether intentional or inadvertent) in dropping to the floor certain objects which had been mentioned in testimony but not introduced in evidence, was not calculated to prejudice the jury. The objects were not of material evidentiary importance.

The cases cited by the appellant in support of his argument that the court erred in not instructing on voluntary manslaughter do not furnish that support. The cases do not hold that a voluntary manslaughter instruction is required where the sole defense to a murder charge is the claim of self defense and the defendant, testifying in his own behalf, does not state any facts furnishing the basis for a manslaughter instruction, such as a sudden affray or heat of passion.

The appellant was not entitled to an instruction under KRS 435.050 because the offense therein defined is not a lesser degree of the crime of murder, and the appellant could not have been convicted of that offense under the murder indictment. Wilkey v. Commonwealth, Ky., 452 S.W.2d 420; Faught v. Commonwealth, Ky., 467 S.W.2d 322.

The trial court did not err in rejecting as a basis for a new trial the alleged denial by the bailiff of the jury's request that there be brought into the jury room an affidavit as to the testimony of an absent witness. Counsel

did not raise this ground until a week after he had discovered it, and then did not present any affidavit in support of the ground. The matter originally was suggested in an informal way, and no formal amendment to the motion for a new trial was filed until several days later. It is the opinion of this court that to invoke the serious action of setting aside a conviction of murder, greater diligence and effort was required.

The judgment is affirmed.

Jones, Milliken, Osborne, Reed, Steinfeld and Stephenson, JJ., concur.

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MANDATE

THE COMMONWEALTH OF KENTUCKY
THE COURT OF APPEALS
73 Term—November 23, 1973

ROBERT LEE SMYZER, SR.

vs.

COMMONWEALTH OF KENTUCKY
73-438

APPEAL FROM A JUDGMENT OF THE
JEFFERSON CIRCUIT COURT
147724

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

/s/ Frances Jones Mills
Frances Jones Mills,
C.C.A.

A copy—Attest:
Issued February 15, 1974

CLOSING ARGUMENT OF COMMONWEALTH'S ATTORNEY
(February 27, 1974)

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MR. WOOLDRIDGE: If the Court please, Mr. Haddad, Mr. Grantz, ladies and gentlemen of the jury,

Mr. Haddad talked to you approximately 15 minutes, and I see no reason why I shouldn't be able to say what I want to say in that length of time.

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You will remember yesterday morning when Mr. Haddad, Mr. Grantz and I chose the jury, about the only question I asked you of any consequence was if the Commonwealth proved beyond a reasonable doubt that the defendant on trial committed wilful murder would you set his sentence at life in the penitentiary. And, of course, all of you said yes. And, as we have found out now from the J: dge's instructions, if you are convinced beyond a reasonable doubt that the defendant murdered the deceased, then you have only one alternative and that, of course, is life in the penitentiary.

Now, as you also know, that is the maximum punishment permitted for murder. In the Bible you've got an eye for an eye and et cetera, but here it is life in the penitentiary for a murder. The most you can give. And, of course, life is a long time, sentencing somebody to life in the penitentiary. But, of course, death is a lot longer. Now, as you probably also know there's only one crime in Kentucky that you can give more punishment for than murder, and that's rape; rape you can get life without parole.

MR. HADDAD: Your Honor, please, I want to object to that.

THE COURT: All right, sustained.

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MR. WOOLDRIDGE: The maximum punishment that one can receive for murder, since the Supreme Court decided a few months ago, is life in the penitentiary.

Now, we are not dealing here with a manslaughter case. In manslaughter you can get 2 to 21 years in the penitentiary, 2, 5, 10. And, of course, I'm sure all of you know the difference between a manslaughter and a

murder, where somebody in the heat of passion, in an argument, kills another one, doesn't—doesn't have any premeditation, just does it in the heat of things; that's manslaughter. But, of course, we have no evidence of that at all here. And, of course, that is what the Judge's instructions say; either murder, life in the penitentiary, or nothing.

Now, of course, in every murder case the Commonwealth has to prove somebody was killed. And we don't have any problem with that, do we? We know that Mr. Sands was killed by the defendant. He admits it.

Now, of course, my best witness, the witness who could tell you what happened, in those, as he says eight minutes, I don't know how long it was, but in that interlude when they first

met until Mr. Sands left this life, I don't know what happened. Mr. Sands, as I say, could tell us if he were here. But even relying on the defendant's own statement, you people are reasonable, we've got some young people, we have some a little older, we don't have any real old people on the jury, we've got both sexes, we've got both colors, all of you have a right, as Mr. Haddad says, to make reasonable inferences from the evidence.

I don't know the motive, I don't know why the defendant decided in those few minutes they had there to kill his good friend of two years. And, of course, I'm not required to prove a motive. Could have been a lot of things. Only the defendant and the deceased know. The defendant tells us his version knowing that we can't contradict it at all, nobody is there listening to them. But we have the inferences that you as reasonable people can draw from what the two eye witnesses saw.

Two gentlemen who are doing their duty, even more so than you people. You are to be commended for answering the jury summons, coming down here and listening to these trials. A lot of your fellow citizens

won't do it, use all kind of excuses. You are commended for that. But even more to be

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commended are the two eye witnesses who have absolutely nothing to gain in this case, no axes to grind either way. "We saw what happened, Mr. Wooldridge. We will come down to your court, we will tell His Honor and the jury what we saw." And what did they see? They saw the defendant kill the deceased, that's what they saw.

The defendant picked a mighty bad time to commit his fiendish act of murder, his timing was very bad. Usually when one commits murder it's not before two eye witnesses. Of course, he didn't realize these two gentlemen were going to come up unexpectedly; but they did. And what did they say? Well, I wrote down a few phrases that they used knowing, of course, that you people who have nothing else on your mind, don't have to worry about calling this witness or that witness to ask this question or that question, knowing that you people can remember probably a lot better than I can the exact language and the exact testimony that the two defense witnesses, the two eye witnesses used. As I say, I wrote it down.

James Dye worked down there for 11 years. He knew Mr. Smyzer, the defendant, he was in the building where he worked. He saw Smyzer and

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Sands three feet away. Three feet. That's not very far, is it? Three feet. A yard, three feet away, he sees this happen. Unexpected he comes up on it. What does he see? First of all he heard this man who is claiming self defense say "You" something. Now, a man acting in self defense, is he going to do any talking? "You" blank before he slashes him from the left side all the way around under his throat here.

Mr. Larry Meriwether, another witness, the other eye witness, has no ax to grind at all. He says, "I was five feet or less away from him. I heard him call him a son of a bitch." Heard who call him a son of a bitch? Heard the defendant call the man he was getting ready to kill a son of a bitch. Saw him grab him by the front, hold him that way so he could slash him better. He saw that, looking right at it five feet away.

And you remember when the defendant took the witness stand and I asked him about the knife that he had in his pocket? And he brought it out. "Did you need two hands?" No, one was plenty. One was plenty, didn't need the other hand, did he? Huh? Didn't need that other hand. Just one hand is all he needed. That's all he needed. What was he

doing with the other hand? Holding the dead man so he could slice him better; deeper; three and four inches deep. How far does that take you inside there, three or four inches deep? Holding him there like you'd take a pig, or a hog, and slaughter it. Six or seven inches long. One hand is all he needed.

I don't know why. I can't get in his mind to find out why he did it. I just know he did it. Two people saw him do it.

Now, then we've got the fellow bleeding to death, able to maintain his upright position for awhile, finally falls down and dies there in his own pool of blood. Of course, we had pictures taken of him, but they were so gory they couldn't be introduced—

MR. HADDAD: (Interrupting) I object to this, if Your Honor please.

THE COURT: Sustained.

MR. WOOLDRIDGE: The only pictures we could show are these where the victim is not there. But the ones you see, all that blood, that's what happens when you cut a man's jugular vein, go in there four inches,

three or four inches deep. Just like a hog. Any of you people born on a farm? Ever see a hog slaughtered? Sometimes they shoot

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them in the head, sometimes I understand they cut their throat.

Now then, "I was afeared of him, I feared him, I was afraid of him." Bad man, bad reputation. Six foot, 190 pounds. Well now, we have seen the size of the defendant. He has got up and walked in here to the witness stand. We have seen what kind of fellow we are dealing with, a muscular man. I haven't weighed him, I don't know what his weight is, but I would think it would be safe for me to say that there wasn't a heck of a lot of difference in their sizes, based on what you have heard about the size of the man and what you see here.

But we—his only crime I can find out was that he had two knives in his pocket.

And let's find out what this man with this bad reputation, who the defendant says never had heard of him cutting anybody, you know, you can do a lot of things with knives besides murder people. You can whittle, you can use them in your work, like he said he needed his knife to open up packages.

What did the dead man have in his pocket besides the knives? Well, I wrote that down, too, just to find out about this bad man who he was afraid of. How was he—what did he have in his

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pocket? (Mr. Wooldridge putting items into his pocket.) Well, he had a four inch knife in his left rear pocket, and he had his wallet in that pocket. Going to be hard to get to that one way back there. I don't believe he's going to use that for anything way back there out of the way to cut anybody. In two years we couldn't find any evidence that he ever cut anybody at all, that he even ever tried to cut anybody.

The defendant said he had some kind of dispute with the policeman. He says that. I don't know whether he did or not. That's what he says. I know I had a dispute with a policeman when I was 18 years old, too. I don't know anything about that; really has nothing at all to do with this case.

We didn't have any evidence at all that I heard that this man had ever used his knives for anything except whittling or using it in his work.

Now, what about the other knife? That's the one that this man is afraid of evidently. He was afraid he was reaching in his pocket. What did he have in that pocket? Right front pocket. A case pocket knife. Had a pocket knife in here. Had a package of Kool cigarettes, had a ring of keys, had a pack of gum. All this in his right front

pocket with a pocket knife.

And you remember the defendant said yesterday that he was able, with a washrag in his back pocket, and a knife there, he was able to take that knife out, switch them, before this man was able to get in his pocket. He wasn't going for his pocket at all. He didn't realize he was going to get killed right there, had no idea.

And as I repeat again, I don't know what the motive was, but I do know what the two eye witnesses saw. And I do know that we have a statement from him about all these minutes, eight he says, where it all started. He says. The dead man is out there in the graveyard. He says he called him a bad name. Now nothing, as he says, he says, he says, he says. Knowing that this was a man to be afraid of do you keep aggravating a man like that, bothering him? He has worked all night long as a packer, eight hours, manual labor.

When you say "How are you today, brother", and he indicates that he doesn't want to talk to you, he is a man to be feared, do you keep egging him on, getting him to talk some more, spend all this time with him? You just

leave him alone. It's no crime if a man has worked hard all night and

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he is out of sorts. He says. It's no crime for him not to be sociable. And it wouldn't have been any crime if this man would have left him alone. That's all he had to do. But I say again and again and again he murdered him in full view of the two eye witnesses; no reason at all to do it.

Now, I realize I've got to convince every one of you of that, all 12 of you. And it might be you will say, "Well, Mr. Wooldridge, yesterday you told us about a lot of witnesses and some of the witnesses you didn't produce. And what about these knives in the pocket? Shouldn't you have put all the witnesses on? Shouldn't you have had the mother come in and bring the knives and things that were in his pocket? Wouldn't that have helped us? Shouldn't you have subpoenaed some of the people that worked with both of them? Maybe it would have helped us to really see what both gentlemen's reputations were. Maybe you didn't prepare this case as well as you should." Well, maybe one or two of you, or all of you, could feel that way. "It's a serious case, Mr. Wooldridge, and we think we should have more proof than what you presented to us."

If you feel that way then, of course, we will have what we call a hung jury, if all 12 of

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you don't agree on it. And I say to you if you honestly feel that way, you think I could have done a better job, you think that in this serious case that involves life in the penitentiary, that the jurors should have more information, then I will try it again. I am here full time, been here nine years, and I'm going to be here as long as I can trying cases. I don't mind trying it again.

I don't think—you know, in preparing this case I didn't think I needed any more than what I have; the

two eye witnesses and his statement admitting the crime. But if you think so why, of course, I will be glad to accommodate you.

* * * *

(Whereupon the following proceedings were held at the bench out of the hearing of the jury.)

MR. HADDAD: I want to object to the last statement that Mr. Wooldridge made advising the jury that if they felt he didn't present a good enough case that they should hang the jury. And for that and for two other reasons.

No. 2 was when he told the jury that there was one other crime for which there was a greater punishment, and that was rape; telling them that was

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tantamount to telling the jury what the law prohibits telling them, that life is without parole.

The third is he mentioned they had other photographs that were so gory that they weren't permitted to show them. This is commenting on evidence that the Court specifically excluded. For all of those reasons we would move that the jury be discharged.

THE COURT: Overruled.

(End of proceedings at bench.)

* * * *

THE COURT: Ladies and gentlemen, you may now retire to your jury room. Take the instructions and whatever evidence has been admitted into evidence.

(At this point Mr. Wooldridge dropped several items on the floor.)

THE COURT: When you reach a verdict please indicate so by knocking on the door. You may now go with the bailiff.

(Whereupon the jury retired to begin their deliberations and the following proceedings were had at the bench.)

MR. HADDAD: Prior to the jury leaving the jury box, let the record indicate that Mr. Wooldridge dropped from his pocket an envelope containing two pocket knives, and several sticks of wood, and a bottle of medication of some type, all within the view of the jury. This was not evidence that was introduced in the case. This is further reason that the jury should be discharged.

THE COURT: Right now I will overrule it, but I might reconsider it later.

* * *

HEARING MOTION FOR NEW TRIAL

Heard before:

Honorable John P. Hayes, Judge
Jefferson Circuit Court,
Louisville, Jefferson County, Kentucky,

in Judge Hayes's chambers, on March 16, 1973.

APPEARANCES

For Plaintiff: Mr. Herschel Wooldridge

For Defendant: Mr. Frank E. Haddad, Jr., and
Mr. Kenneth Grantz

* * * *

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MR. HADDAD: A fellow by the name of Gerald McGee telephoned my office at 10:25 March the 8th, and left his telephone number at work, 426-2000, Extension 479 or 458.

The message was he was on the Smyzer jury. I telephoned him back down there the next day, on the 9th, and he wasn't there. And they gave me a home telephone number, 895-0439.

So I had determined that you had already excused that jury for further services, so I went ahead and called him. And this is a recording of what he told me on the telephone.

(At this point a tape recording of the aforementioned telephone conversation was played by Mr. Haddad. Said tape is filed herewith, made a part hereof, and marked Defendant's Exhibit A for purposes of identification.)

MR. HADDAD: I didn't know the jury had asked for the affidavit that Kenny gave.

THE COURT: Well, they asked for the copy of the affidavit.

MR. HADDAD: I think if they asked for it they should have been entitled to have it, you know, read back to them, Judge. As I say, I didn't

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even know that during the deliberations that they had asked for it, or I would have raised it at that time. I didn't know it until this guy here told me. But I just throw that out because it would be another reason we didn't put in the motions and grounds for a new trial, because it came up after we had filed it, I think we've got some right sharp points in the brief.

THE COURT: Yes, I do, too, quite frankly. Were you going to—have you read this at all? I haven't even read it, to be quite frank with you. Are you going to give me something, too?

MR. WOOLDRIDGE: I want Mr. Haddad to make his arguments orally in court before you, and I want to respond orally, and I want you to read both of our arguments. I prefer to do it that way than to write it all down and give it to you.

MR. HADDAD: Do you want to do it for the effect it will have on the family?

MR. WOOLDRIDGE: No, I want to convince the Judge that he shouldn't give you a new trial. That's the reason I want to do it.

THE COURT: Would you give me a chance to read this first?

MR. HADDAD: Certainly.

THE COURT: Can't we pass it for

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another week then?

MR. WOOLDRIDGE: I'd like about two or three weeks.

(At this point there was an off record discussion.)

THE COURT: I'm going to pass this motion for new trial until next Friday. Quite frankly I haven't had a chance to read these motions. I'd like to before you argue the thing. If both of you will be prepared next Friday we will get this thing over.

* * * *

HEARING MOTION FOR NEW TRIAL

Heard before:

Honorable John P. Hayes, Judge
Jefferson Circuit Court,
Louisville, Jefferson County, Kentucky

in open court, on March 29, 1973.

APPEARANCES

For Plaintiff: Mr. Herschel Wooldridge

For Defendant: Mr. Frank E. Haddad, Jr., and Mr. Kenneth Grantz

* * * *

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THE COURT: This is Robert Lee Smyzer's motion for a new trial. Do you have anything you want to put in the record? I'm going to overrule your motion for a new trial and sentence him.

MR. HADDAD: All right, sir.

THE COURT: Do you want to put something in the record? Have you got everything in there you want?

MR. HADDAD: I would like to reduce to writing the additional grounds for a new trial, with the Court's permission, that we discussed at the last calling of this case in chambers.

THE COURT: Right.

MR. HADDAD: And ask that the court stenographer transcribe that tape and make it a part of the record.

THE COURT: Right.

MR. HADDAD: I'd like permission, if Your Honor please, to file that in the record today as an additional grounds and motion for new trial.

THE COURT: All right.

* * * *

(The following is transcription of the tape filed with the hearing of March 16, 1973:)

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MR. HADDAD: Sir.

MR. McGee: Yes.

MR. HADDAD: How are you?

MR. McGEE: Fine.

MR. HADDAD: I was out yesterday and I didn't get to return your call.

MR. McGEE: Right. I'm out today. I don't know if you just wanted to talk about this or not. I feel a little funny about it, you understand.

MR. HADDAD: Oh no, that's perfectly all right. You all have been excused over there, haven't you?

MR. McGEE: Yes, uh huh. Yes, uh huh.

MR. HADDAD: What happened back in there?

MR. McGEE: Well, there were a few things that kind of disturbed me. I held out, or a couple of us held out, to the last minute, you know. There were so many things interjected in there in the discussion that I felt—I know it influenced some of the people that were in there, and things that maybe should have been—should not—for instance, you know the testimony of the

security—head of the security out there, that was discussed

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rather openly. And on the basis of that, the remarks made that people knew he was no good and that he had been in trouble before. And this was in between like the first and second vote. On the first go-round it was 7 to 5 guilty, and 5 not guilty.

MR. HADDAD: Uh huh.

MR. McGEE: Well, three not guilty and two of us were—two said we just didn't have enough yet to really make a decision, or we hadn't talked about it enough. And then after some of these discussions went on among the five that said not guilty were three women. And they got talking about, you know, different things, and having this guy, dangerous guy like this, loose on the street, and they went the other way.

MR. HADDAD: Huh.

MR. McGEE:And I don't know, maybe this is normal, I lack experience.

MR. HADDAD: No, that one thing that disturbs me is about the security guard, because he really didn't say anything.

MR. McGEE: No, and his testimony was supposed to be struck.

MR. HADDAD: Right.

MR. McGEE: And he didn't really

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contribute anything to the character of the men one way or another, you know.

MR. HADDAD: Right.

MR. McGEE: But I feel somehow on the basis of what he said—there was one guy on the jury said, "Oh, I know that guy has been in lots of trouble before, I can just tell", you know.

MR. HADDAD: Isn't that terrible.

MR. McGEE: It is. It has influence on the others. And there was one woman in there said, "Well, I'm

not—I've got to find him guilty." She said, "Because I'm afraid of what the victim's family might do to me if we didn't find him guilty."

MR. HADDAD: Oh my God.

MR. McGEE: I know. And so I thought—there were things like this that got to me and I thought I had to talk to somebody about it.

MR. HADDAD: Isn't that terrible.

MR. McGEE: I really think it is. But, you know—I really think that the judicial face of our government is somewhat responsible for this, because people are mostly ignorant about what they're supposed to do or how they're supposed to conduct themselves.

MR. HADDAD: There should be some

orientation course in here that—now, to think that the family of the deceased person would be of some danger to them, that's terrible.

MR. McGEE: Well, that was openly expressed in there and it certainly, I think, had a detrimental effect on the decision.

MR. HADDAD: Isn't that terrible. Did they mention anything at all about the possibiliy of there being more evidence that—

MR. McGEE: (Interrupting) Very definitely. One thing that troubled me, and I felt maybe—I sort of faulted you for it—was the fact that the deposition that was read by—you know, your associate—

MR. HADDAD: (Interrupting) Uh huh.

MR. McGEE: (Continuing) —on the stand, we felt that was the only supportive evidence that had been presented to substantiate his fears.

MR. HADDAD: Uh huh.

MR. McGEE: And it wasn't entered as evidence. And we asked for them to send it in and they wouldn't of course.

MR. HADDAD: Oh, they would not send that back there?

MR. McGEE: No, they said it was

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never entered in evidence and we couldn't have it.

MR. HADDAD: Well, that was wrong, it was entered as evidence.

MR. McGEE: Well, they told us—the bailiff told us no, that we couldn't have that, that was not entered as evidence by anybody. And that really kind of disturbed us.

MR. HADDAD: Oh.

MR. McGEE: Because it was the only supportive thing. Because if we had of had that, and it said what I thought it said, we'd still be there as far as I'm concerned.

MR. HADDAD: Yeah. Isn't that terrible. That bailiff should have come out and reported that to the Court, and he didn't do it.

MR. McGEE: Well, I really don't think that he did. I'm not accusing the man of anything or—

MR. HADDAD: (Interrupting) We've got a motion for a new trial up next week on this case.

MR. McGEE: I see.

MR. HADDAD: On the—I think it's on the 16th.

MR. McGEE: Uh huh.

MR. HADDAD: And we've got a real

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good chance of getting a new trial on it.

MR. McGEE: I see. Well, you know, I'm not offering myself as a sacrifice or anything, because I certainly don't want to put any of the people—

MR. HADDAD: (Interrupting) No.

MR. McGEE: (Continuing) —that were on the jury in a—in an embarrassed position.

MR. HADDAD: No, I wouldn't do that to them.

MR. McGEE: I think that people should be encouraged to respond more readily to this need when they are called upon.

MR. HADDAD: They should be.

MR. McGEE: They shouldn't be scared off by something that may have happened after they had had an experience, you see.

MR. HADDAD: Yeah. That's unfortunate, really, that they should have any hesitancy at all about doing anything, you know, because of possible fear from the victim's family.

MR. McGEE: Yes. Well, that was openly expressed by one of the girls. And, you know, it's kind of a—I think a phobia that runs around, the streets are not safe to walk on, it's part of that

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phobia.

MR. HADDAD: Yeah.

MR. McGEE: You know, that I don't put much stock in myself. But—so there were really a number of things that troubled me. And another thing that they said was—they said, well, if he isn't guilty he can appeal, you know.

MR. HADDAD: Oh, my God.

MR. McGEE: And I said—well, I said I would kind of think that many people in his economic situation would never be able to get up enough money to go through appeal procedure.

MR. HADDAD: He wouldn't have had enough to hire anybody like me—

MR. McGEE: (Interrupting) I know.

MR. HADDAD: (Continuing) —except that I believed in his cause when he came in here. And, you know, we went with him really on a pauper's type fee thing, you know.

MR. McGEE: Uh huh.

MR. HADDAD: Just sometimes you get these cases where you just—people cannot afford you, but you believe in their case, and you just go ahead and take it for whatever they can bring in.

MR. McGEE: I know. And another

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woman said, well, you know, she wasn't too sure but she certainly didn't want him running around loose on the chance that he might be a bad guy, you know.

MR. HADDAD: There was a little woman who sat on the front row there.

MR. McGEE: Yes.

MR. HADDAD: Who used to live across the street from me when she was a child.

MR. McGEE: Uh huh.

MR. HADDAD: In fact, she was raised across the street. Her mother still lives across the street.

MR. McGEE: What age would you say she is?

MR. HADDAD: Oh, I'd say right now she's 24, 25.

MR. McGEE: Yes, uh huh; yes, uh huh.

MR. HADDAD: Alwick or Bowick—Bowick was her name.

MR. McGEE: Dolweck?

MR. HADDAD: Dolweck is the name.

MR. McGEE: Yes, uh huh. Well now, she is the one that dropped a bomb about the victim's family.

MR. HADDAD: Yeah.

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MR. McGEE: In sizing her up I kind of thought—I mean prior to our beginning—that she would be—you know, more lenient in her position.

MR. HADDAD: Yeah, I figured that she would, because her family are from northern Ohio, and they are all very, very liberal, particularly, you know, on the black and white question.

MR. McGEE: Right.

MR. HADDAD: And I figured she'd be a pretty good juror for that reason.

MR. McGEE: Well, it just shows it's pretty hard to judge people.

MR. HADDAD: Oh, it is.

MR. McGEE: But she was very adamant in her condemnation.

MR. HADDAD: It's just a—it's a wild guess at best, you know, when you are picking a jury.

MR. McGEE: Well, I just wanted to pass this on.

MR. HADDAD: Yes, and I really appreciate it, Mr. McGee. If more people had these things at heart like you do we'd have a better idea of what to do in these cases. Look forward to seeing you again sometimes, and if I can ever do anything

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to help you, why, don't hesitate to call me.

MR. McGEE: All right, maybe I'll do that.

MR. HADDAD: Any time.

MR. McGEE: All right, fine.

MR. HADDAD: Thank you. Bye.

MR. McGEE: Bye.

(End of transcription of tape.)

* * * *

THE COURT: I'm going to sentence him to the Department of Corrections to serve a period of life in the penitentiary.

MR. HADDAD: Excuse me, Judge. (To Mr. Smyzer) He has overruled your motion for a new trial and he is sentencing you.

MR. SMYZER: Sentencing me now?

THE COURT: It's also my duty, even though you have employed counsel, to advise you of your rights on appeal. If you can't afford an attorney we will appoint one for you to handle it, we will file the notice of appeal for you. Are you going to stay on it?

MR. HADDAD: Yes, sir, I will stay with it.

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MR. SMYZER: Can't something be done about this right away? I been laying over in jail unjustified.

THE COURT: Yes, sir, you are going to the penitentiary probably today or tomorrow.

MR. SMYZER: Well, I can't see myself going to the penitentiary for you all letting the jury go home and—

THE COURT: (Interrupting) Well, that's your problem, Mr. Smyzer.

MR. SMYZER: I can't get hurt any worse than I am unjustified like this.

THE COURT: Take him away.

* * * *

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FILED
JUN 14
MICHAEL RODAK, JR.

In The

SUPREME COURT OF THE UNITED STATES

No. 73-1713

ROBERT LEE SMYZER, SR. ..... PETITIONER

VS.

COMMONWEALTH OF KENTUCKY .... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The Opinion of the Kentucky Court of Appeals was a Memorandum Opinion, not to be cited as authority and which will not be reported.[1]

1. RULE 1.310(b) of the Rules of the Kentucky Court of Appeals provides: "If the issues presented in a case do not involve any new or substantial point of law or any question of public importance the Court may direct that the opinion not be reported officially or cited as authority, which direction will be stated in the opinion and shall be noted by the Clerk on the docket. The opinions in such cases will not detail the facts and will dispose of the issues in a summary manner."

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. **WHETHER THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NO SUBSTANTIAL PROBABILITY THAT PREJUDICE RESULTED TO THE PETITIONER FROM VARIOUS PARTS OF THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT.**

II. **WHETHER THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT ADEQUATE DILIGENCE AND EFFORT WERE NOT DISPLAYED BY PETITIONER'S DEFENSE COUNSEL SO AS TO HAVE PRESERVED FOR A REVIEW ON THE MERITS OF AN ALLEGATION OF ERROR CONCERNING THE JURY'S ALLEGED REQUEST DURING DELIBERATION FOR AN AFFIDAVIT READ INTO THE RECORD BUT NOT INTRODUCED AS AN EXHIBIT.**

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT THERE WAS NO SUBSTANTIAL PROBABILITY THAT PREJUDICE RESULTED TO THE PETITIONER FROM VARIOUS PARTS OF THE PROSECUTING ATTORNEY'S CLOSING ARGUMENT.

Petitioner asserts that the Kentucky Commonwealth Attorney exceeded the bounds of propriety in his closing argument to the jury. This is an incorrect assertion.

The Kentucky Court of Appeals' Opinion in this case, first sentence, states: "It is the opinion of the Court that there is no substantial probability that prejudice resulted from various parts of the prosecuting attorney's closing argument." (See Appendix of Petition at page 1a.) Respondent respectfully submits and reiterates that none of the comments of the Commonwealth Attorney were error, let alone error of constitutional dimensions.

Petitioner complains about the comment of the Commonwealth Attorney in the closing argument that in preparing this case for trial he did not feel he needed any more evidence for conviction than what he produced. This statement along with reasonable comment upon the testimony and facts that had come into evidence by several witnesses placed no new facts before the jury. There was no comment by the Commonwealth Attorney that even served to corroborate the already abundant evidence of

guilt. These comments were not of an evidentiary nature but were non-consequential, fugitive statements by the prosecuting attorney in the zeal of his cause. Only when it is made clear that an attorney has gone outside of the record for his facts and sought by this method to take an undue and unfair advantage of the accused would the court be justified in interfering. *Turner* v. *Commonwealth*, Ky., 275 S.W. 2d 409 (1954); *Lee* v. *Commonwealth*, 142 Ky. 742, 135 S.W. 315 (1911). The frailty of human nature must be recognized and in the heat of argument inappropriate remarks are liable to be made; but unless they are altogether unfounded from any fact or circumstance appearing in the case, and manifest such a wide departure from legitimate deductions as to be at once poisonous and prejudicial, a reversal will not be in order for that reason alone. *Music* v. *Commonwealth*, 186 Ky. 45, 215 S.W. 116 (1919) at page 121. See also *Hunt* v. *Commonwealth*, Ky., 466 S.W.2d 957, 959 (1971). The statements of the Commonwealth Attorney did not present to the jury one strain of evidence of fact that the jury did not know of before he commenced on his closing summation. Counsel for the Commonwealth was in effect indicating to the jury that it was the evidence that had been introduced that was to guide the sensible ladies and gentlemen of the jury in their deliberation on this case.

As for the statements made by the Commonwealth Attorney reflecting the prerogative of the jury to hang and that if they in fact did so, he would try it again, were statements that in all likelihood weakened the case for the prosecution rather than bolstered it. The jury was made plainly aware that if any one of them

did not feel the prosecution had put on proof adequate to find the petitioner guilty beyond a reasonable doubt, they should not feel compelled to change their position to conform with other members of the jury. The jury could either acquit the petitioner under the appropriate instruction or become a hung jury unable to render a verdict.

The Kentucky Court of Appeals stated concerning the above discussed statements as follows: "The remarks with reference to the prosecuting attorney's willingness to try the case over again if the jury thought he hadn't produced enough evidence could be construed as implying that the Commonwealth had more evidence of guilt than it had introduced, but we think such a construction would be a strained one not likely to have been made by the jury." (See Appendix of Petition at pages 1a-2a.)

Additionally, petitioner asserts three other aspects of the prosecuting attorney's summation to the jury. The first of these contentions is pressed on the basis that the possibility of parole was indirectly mentioned in the closing argument of the Commonwealth Attorney. The statement referred to was as follows:

> "Now as you probably also know there's only one crime in Kentucky that you can give more punishment for than murder, and that's rape; rape you can get life without parole." (Transcript of Evidence at page 122.) (See Appendix of Petition at page 5a.)

Thus, the attorney for the Commonwealth made only an off-handed reference to the possibility of parole that was not prejudicial in the least. The Commonwealth Attorney gave no details about the parole scheme or any facts about it.

Respondent acknowledged the large number of Kentucky cases concerning discussion of parole when this case was on direct appeal to the Kentucky Court of Appeals. Yet it was also clearly brought out that in most of these cases the statements about parole have been toward how many years an individual would have to serve before he is eligible for parole. See *Broyles* v. *Commonwealth*, Ky., 267 S.W.2d 73 (1954); *Ringo* v. *Commonwealth*, Ky.. 346 S.W.2d 21 (1961). If it is not improper and prejudicial for the trial court to say that parole is not for the jury to consider, it also cannot be prejudicial to tell them that rape is the only crime in Kentucky for which a convicted person can get life without parole. See *Brown* v. *Commonwealth*, Ky., 445 S.W.2d 848 (1969). The Kentucky Court of Appeals stated in *Broyles* v. *Commonwealth*, supra, at page 76, "the average juror does know there is a parole law in Kentucky."

On this indirect statement relative to the parole issue, the Kentucky Court of Appeals in its Opinion in this case stated: "The indirect reference to parole was not likely to have been construed by the jury as a suggestion that it would be all right to convict the defendant, even if the jury had doubts, because the life sentence could be reduced through parole." (See Appendix of Petition at page 1a.)

The second of these additional allegations of error concerns a reference by the Commonwealth Attorney during his closing argument to a photograph of the deceased at the scene of the crime, which had been excluded by the trial judge from evidence. Five photographs were admitted but the sixth, showing the deceased lying on the floor shortly after his death, was not to be seen by the jury. The Commonwealth Attorney, in making some reference that there did exist this sixth picture; did not travel beyond the limits or bounds of propriety so far as to be prejudicial to the petitioner. Referring to this sixth picture did not add anything to what had already been verbally painted before the jurors' eyes. They knew very well how the deceased had died. They knew how deep and how long the slash was on the deceased's neck. They knew there was a considerable loss of blood. The Commonwealth Attorney's mention of this sixth picture could not have had an inflammatory and prejudicial impact upon the jury. The jury was keenly aware of the blood and gore of this case long before time for closing arguments.

The Kentucky Court of Appeals stated in their Opinion in regard to this picture issue: "The statement that the Commonwealth had taken a picture of the deceased victim that was 'so gory' that it couldn't be introduced was not calculated to inflame the jury, since the mere word 'gory' was not of an inflammatory nature such as would be the picture itself." (See Appendix of Petition at page 1a.)

The last of these three incidents that occurred during the Commonwealth Attorney's summation to the jury is the accusation that the Commonwealth Attorney purposely dropped to the floor out of an envelope several items belonging to the deceased which had been referred to by other witnesses, but which had not been specifically introduced into evidence. The accusation is a brazen one, inferring that the Commonwealth Attorney intentionally dropped this envelope so as to exhibit these objects to the jury. The objects fell to the floor not while the Commonwealth Attorney was summing up the case to the jury, but after returning to counsel's table following proceedings had at the bench out of the hearing of the jury and apparently while the jury was intent upon listening to the trial judge telling the jury they could retire to the jury room. (See Appendix of Petition at page 12a-13a.) Petitioner's trial counsel, after the jury had left the jury box, approached the bench to complain that the Commonwealth Attorney had dropped from his pocket an envelope spilling out two pocket knives and several sticks of wood, and a bottle of medication of some type, all items belonging to the deceased and taken off his body by the coroner.

The Kentucky Court of Appeals on this last issue above-discussed stated: "The court is of the opinion that the act of the prosecuting attorney (whether intentional or inadvertent) in dropping to the floor certain objects which had been mentioned in testimony but not introduced in evidence, was not calculated to prejudice

the jury. The objects were not of material evidentiary importance." (See Appendix of Petition at page 2a.)

Petitioner maintains that these statements and remarks of the Commonwealth Attorney in this case present an issue of violations of the Sixth Amendment right of confrontation. Unquestionably the petitioner has the right to meet the witnesses testifying against him face to face. And, this right was not denied in the case at bar. The petitioner contends that the Commonwealth Attorney was an unsworn witness against him and not subject to cross-examination. Yet, as has been pointed out above and as was pointed out in the Kentucky Court of Appeals, none of the comments by the Commonwealth Attorney were of an evidentiary nature. He placed no facts before the jury that they were not already advised of. He asserted no material fact that the testimony does not support, or which asserted fact was not deducible from other facts or circumstances proven. Therefore, in that the Commonwealth Attorney did not go outside the prescribed limits within which counsel in their argument to the jury should be confined, there cannot be an issue of confrontation. The Kentucky Court of Appeals stated in its Opinion that they did not consider the statement and remarks of the Commonwealth Attorney constituted the giving of material testimony such as to be a violation of the right of the petitioner, under Section 11 of the Kentucky Constitution and the Sixth Amendment to the United States Constitution, to be confronted by the witnesses against him. (See Appendix of Petition at page 2a.)

Petitioner further maintains that the "errors" of the prosecuting attorney through his prosecutorial statements should be reviewed under the "reasonable doubt" standard set forth in *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). One of the fatal flaws in this argument is the necessity for there to have been adjudged that an error or errors were committed to which any "error" standard may be applied. That is, the petitioner must show that the prosecutor's comments in question were improper or error at all before an issue arises as to whether a recognized error is harmless or prejudicial. In the direct appeal of this case to the Kentucky Court of Appeals, that reviewing court found the complained of prosecutorial statements not to be error. In that the Kentucky Court of Appeals determined there to be no error it was unnecessary for a consideration pursuant to Kentucky Rules of Criminal Procedure, hereafter "RCr," 9.24, the state harmless error rule, which states as follows: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The Kentucky harmless error standard, as with any harmless error standard, is predicated on the determination by an appellate court that what has been complained of on appeal is error. Upon making that determination, that there was in fact an error, defect, irregularity or variance in the trial below, then and only then must an analysis be made by the reviewing court as to whether the error was prejudicial or harmless to the accused, recognizing all the while that some errors are per se prejudicial.

Thus, in the case presently before this Court, the state appellate court recognized that no error had occurred by the Commonwealth Attorney's statements and actions and there was no application of Kentucky's harmless error rule. Since there was found no need to consider the application of Kentucky's harmless error rule, RCr 9.24, there can be no grounds to base an argument that the *Chapman* standard for harmless error should have been utilized.

Furthermore, another flaw in the case herein is that the *Chapman* standard is applicable to federal constitutional error. Petitioner cites no authority which would support the proposition that the alleged errors involving prosecutorial statements during closing argument are such that they are a violation of due process and thus are to be elevated to the level of federal constitutional error. Since there is no federal constitutional error, in fact no error at all, in this case, it is unnecessary to consider the petitioner's argument that the alleged errors were not harmless beyond a reasonable doubt under *Chapman*, supra, and its progeny. See, for example, *Davis* v. *Craven*, 485 F.2d 1138 (9th Cir. 1973).

This Court does not sit as a court of criminal appeals to review state criminal cases. *Burgett* v. *Texas*, 389 U.S. 109, 19 L.Ed. 2d 319, 88 S.Ct. 258 (1967). Respondent submits that petitioner's application for certiorari should be denied.

II.

THE KENTUCKY COURT OF APPEALS CORRECTLY DECIDED THAT ADEQUATE DILIGENCE AND EFFORT WERE NOT DISPLAYED BY PETITIONER'S DEFENSE SO AS TO HAVE PRESERVED FOR A REVIEW ON THE MERITS OF AN ALLEGATION OF ERROR CONCERNING THE JURY'S ALLEGED REQUEST DURING DELIBERATION FOR AN AFFIDAVIT READ INTO THE RECORD BUT NOT INTRODUCED AS AN EXHIBIT.

Petitioner's second argument concerns an affidavit. At the trial of this case, counsel for the petitioner requested of the trial court, at the bench out of hearing of the jury, to be allowed to read into evidence an affidavit and for admonishment to the jury that they were to accept the affidavit the same as it would be if it were testimony. The trial court permitted the affidavit to be read into the record before the jury. (See Footnote One, Petition for Writ of Certiorari, at page 19.)

The interesting thing about this affidavit, it should be noted, is that the affiant is the petitioner herein who is stating in that affidavit what *another individual* would state if he were at the trial to testify. Be the proprietv of this as it may, the hassle concerning this affidavit supposedly commences when during the jury deliberation a request was made to the bailiff in charge of the jury that they be allowed to have this affidavit. The affidavit itself, the piece of paper, was not introduced into the record as a defense exhibit.

The sole evidence of this alleged request is the conversation, supposedly over the telephone, between peti-

tioner's trial counsel and one of the jurors at petitioner's trial. This conversation supposedly took place on the 9th day of March, 1973. The jury's verdict finding petitioner guilty of willful murder and fixing his punishing at life in the penitentiary was returned in open court on the 27th day of February, 1973. Petitioner by counsel orally moved the trial court for a new trial on the same date, the 27th of February. Subsequently, and in full compliance with Kentucky Rule of Criminal Procedure, Rule 10.06[2], the petitioner by counsel on the first day of March, 1973, filed a written motion for new trial. This motion was initially passed to March 16, 1973.

Thus, as it can be calculated, the taped conversation purportedly between one of the jurors, a Mr. McGee, and petitioner's trial counsel, did not occur until after the written motion for new trial was filed and seven days before the hearing was scheduled on motion before the court.

A tape recording of the alleged telephone conversation was filed at the hearing on the motion for new trial on March 16, 1973. Petitioner did not attempt to verify the matters concerning the affidavit by offering into the record any affidavits supporting it. No one, especially the trial judge, had the benefit of know-

2. "RULE 10.06 TIME FOR MOTION: The motion for a new trial shall be served not later than five (5) days after return of the verdict. A motion for a new trial based upon the ground of newly discovered evidence shall be made within one (1) year after the entry of the judgment or at a later time if the court for good cause so permits."

ing if that tape recording was made on the 9th of March or when. Furthermore, and more importantly, there was no way of knowing whether the voice heard on the tape is that of the juror, Mr. McGee, or someone else. No attempt was made by defense counsel to amend his motion and grounds for new trial although a week transpired from the time the telephone conversation allegedly took place (March 9, 1973), until the date of the hearing on the motion (March 16, 1973). In fact, not until March 29, 1973, after two passings of the motion by the judge on the 16th of March, 1973, and again on the 23rd of March to the 29th of March, 1973, was any amended motion filed of record in this case. Thus, considerable time had passed that would have afforded the opportunity for petitioner's defense counsel to have brought this Mr. McGee into defense counsel's office for the purpose of making a sworn affidavit to the truthfulness of the statements credited to him heard on the tape that was tendered to the court. Moreover, there was apparently no attempt to get an affidavit of the bailiff to tender to the trial court to support this ground for a new trial. Without any affidavits or other verified evidence to support the affidavit contention for new trial. the court did not have much to consider and did overrule this and all other grounds for new trial.

One additional factor to be considered is that Kentucky's criminal procedure rules continue the engrained policy against jurors undertaking to impeach a verdict where they participated in the deliberations concerning it except to establish that the verdict was arrived at by

lot. Kentucky Rules of Criminal Procedure, Rule 10.04.[3] (See *Brown* v. *Commonwealth,* Ky., 490 S.W.2d 731 (1973); *Hill* v. *Commonwealth,* Ky., 474 S.W.2d 95 (1971). Also see *Brown* v. *United States,* 224 F.2d 845, 848 (6th Cir. 1955).

Under all of the circumstances disclosed above, there was no showing sufficient to overcome the presumption of regularity of the verdict and no abuse of discretion on the part of the trial court in denying this ground for a new trial.

This case, of course, was appealed to the Kentucky Court of Appeals. One of the grounds argued for reversal was that the trial court erred in rejecting as a basis for a new trial the alleged denial by the bailiff of the jury's request that there be brought into the jury room an affidavit as to the testimony of an absent witness. The Kentucky Court of Appeals' Opinion in this case, considering that the whole argument was so unverified and unsupported by the record, is profound wherein it states as follows: (See Appendix of Petition at pages 2a-3a.)

> "The trial court did not err in rejecting as a basis for a new trial the alleged denial by the bailiff of the jury's request that there be brought into the jury room an affidavit as to the testimony

3. "RULE 10.04 EXAMINATION OF JURORS AFTER VERDICT: A juror cannot be examined to establish a ground for a new trial, except to establish that the verdict was made by lot."

> of an absent witness. Counsel did not raise this ground until a week after he had discovered it, and then did not present any affidavit in support of the ground. The matter originally was suggested in an informal way, and no formal amendment to the motion for a new trial was filed until several days later. It is the opinion of this court that to invoke the serious action of setting aside a conviction of murder, greater diligence and effort was required."

As can be seen from the quote from the Kentucky Court of Appeals' Opinion above, the highest state court in Kentucky did not pass on the merits of the question presented.

The Kentucky Court of Appeals did not make a determination as to whether or not this alleged incident involving the bailiff, if it had been properly preserved and placed before them for review, would constitute error. Of course, the Kentucky Court of Appeals also did not review this allegation against the yardstick of RCr 9.24, the Kentucky harmless error rule. Thus, there is no harmless error issue to which an argument concerning *Chapman* v. *California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967) may be made.

In light of the circumstances set forth above, we submit it is unnecessary for this Court to consider this question involving the "denied affidavit," because the question was not properly preserved for review by the Kentucky Court of Appeals and no constitutional dimensions concerning this issue were considered by that reviewing court.

CONCLUSION

The petitioner has failed to establish any circumstances which would require certiorari to be granted in this case. The evidence overwhelmingly supports the conclusions of the trial court and Kentucky Court of Appeals. No substantial federal question is presented and certiorari should be denied.

Respectfully submitted,

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ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, James M. Ringo, one of counsel for respondent, hereby certify that the foregoing Brief was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on June 13, 1974, addressed to counsel for petitioner, Honorable Frank E. Haddad, Jr., 529 Kentucky Home Life Building, Louisville, Kentucky 40202.

James M. Ringo

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Assistant Attorney General
Commonwealth of Kentucky

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Supreme Court Of The United States

OCTOBER TERM, 1973

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versus

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TO THE COURT OF APPEALS OF KENTUCKY

PETITIONER'S REPLY MEMORANDUM

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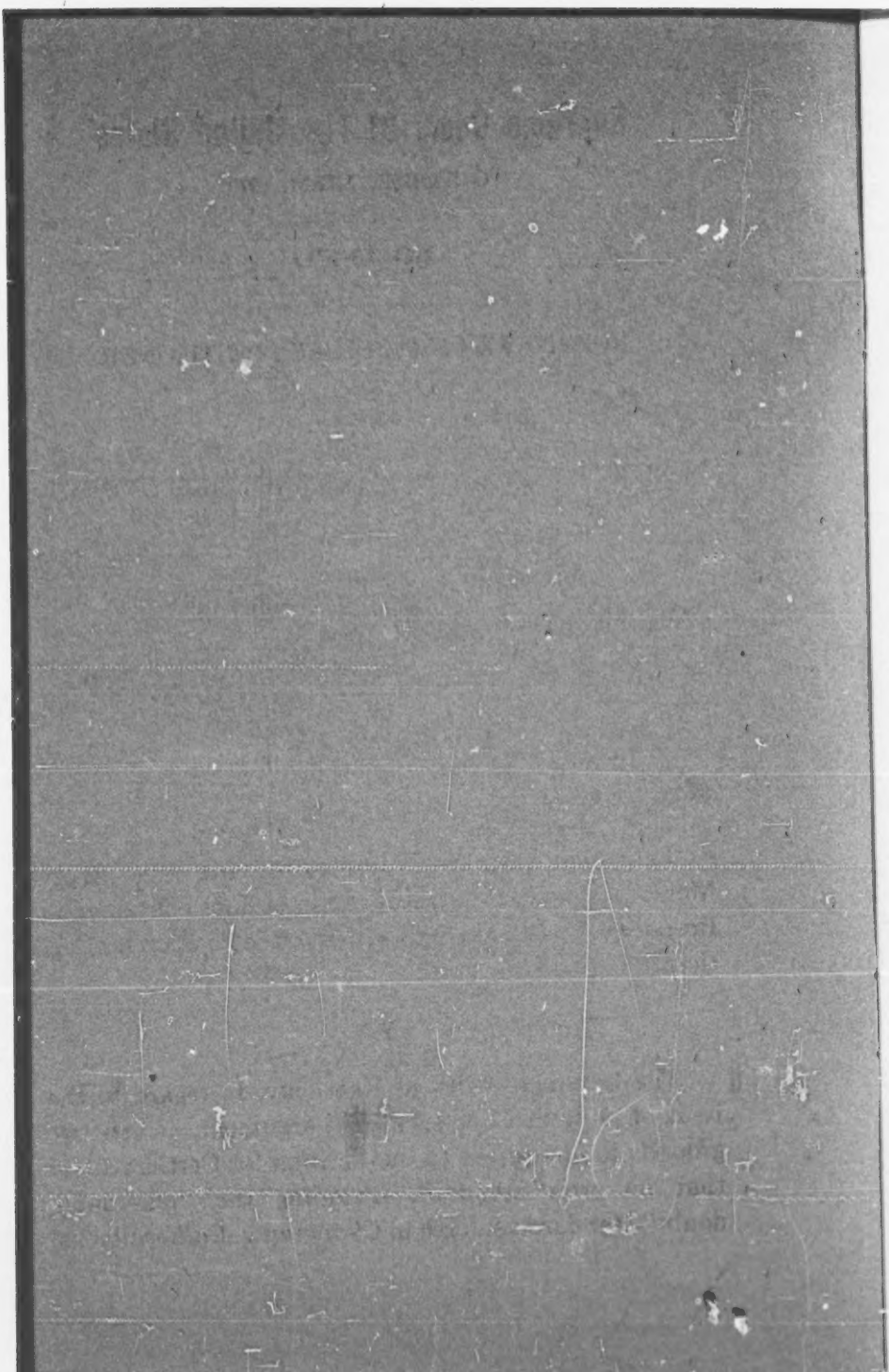

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PETITIONER'S REPLY MEMORANDUM

May it please the Court:

Petitioner feels it necessary to file this Reply Memorandum to rebut certain contentions contained in Respondent's Brief in Opposition to the Petition for Certiorari.

I.

The Commonwealth of Kentucky, in regard to the issue of prejudicial prosecutorial argument, asserts two grounds in opposition to the Petition for Certiorari: (1) that no error standard, including the "reasonable doubt" standard set forth in *Chapman* v. *California*, 386

U.S. 18 (1967), should have been applied in this case because the prosecutor's closing argument contained no errors and the Kentucky Court of Appeals so ruled; (2) And that in the alternative, the *Chapman* standard was not required to be applied here as the prosecutor's statements were not violative of "substantial" constitutional rights. However, the opinion rendered by the Kentucky Court of Appeals in no way supports the Respondent's argument that the Court determined the statements and actions of the prosecutor to not be error. The Court made no such statement and in fact assessed the comments and action complained of by Petitioner as to whether they were prejudicial constituting reversible error or non-prejudicial resulting in harmless error (Appendix, p. 1a):

> "It is the opinion of the Court that there is no substantial probability that prejudice resulted from various parts of the prosecuting attorney's closing argument."

Therefore, the only pertinent issue is whether the closing argument violated Petitioner's substantial constitutional rights and requires reversal under the *Chapman* rule.

The Respondent has cited *Davis* v. *Craven*, 485 F.2d 1138 (CA 9 1973), as authority for the proposition that the errors complained of by the Petitioner were not of constitutional proportion so as to deny to Petitioner his right of due process of law. In that case, involving a petition for federal habeas corpus by a state prisoner, the United States Court of Appeals, Ninth Circuit, held in a six to five decision that the expression of a personal opinion by a state judge as to the guilt of a defendant has

not been elevated to a constitutional status. However, *Davis* is easily distinguishable from the present case. Not only is the correctness of the decision in *Davis* doubtful in light of the rule laid down by this Court in *United States* v. *Murdock*, 290 U.S. 389 (1933), and cases conforming to *Murdock*, but the *Davis* case involved a single instruction by a judge asserting opinion as to guilt, not numerous comments by a prosecutor. Also, the instruction carried with it involved cautionary remarks to the jury that the opinion given as to guilt was indeed only an opinion and was not to be used so as to compel a verdict of guilty. While the trial judge in Petitioner's case sustained defense counsel's objections to the prosecutor's mention of parole and a "gory" photograph not admitted into evidence, he did not attempt to admonish the jury that the numerous remarks, including the statement concerning other evidence in the possession of the prosecutor, were not to be considered by the jury in reaching a verdict.

This Court in *Donnelly* v. *DeChristoforo*, ____ U.S. ____, 39 L.Ed.2d 97, 94 S.Ct. ____ (1974), recently faced the issue of when prosecutorial error in a closing argument will amount to a denial of constitutional due process. Although the opinion by Mr. Justice Rehnquist in that case declared that the distinction between "ordinary trial error" and "substantive constitutional error" would continue to be observed, the majority opinion indicated that there are occasions when prosecutorial error will be raised to constitutional dimensions, and seemed to determine that decisions in such cases must be resolved by a case by case approach. This Court's review in *DeChristoforo* required the actual

consideration of only a single improper and somewhat ambiguous remark by a prosecutor, and that prosecutorial impropriety was followed by a curative instruction to the jury by the trial judge. In determining that the remark was not so misleading as to deny the defendant due process of law, this Court stated:

> "Similarly, the prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."

However, Petitioner feels that the argument in his case that prosecutorial error denied him a right to a fair and impartial trial under due process of law is much stronger than that advanced by the respondent in *DeChristoforo*. The prosecutor in the instant case committed a multiple of errors in a calculated attempt to have the jury believe that they were not receiving all of the evidence against the Petitioner, and no curative instructions were tendered by the trial judge. By advising the jury that there were other witnesses that could have been called and additional proof that might have been presented (Appendix, p. 11a-12a), the prosecutor suggested to the jury that there was other evidence which was being denied to them. The mention of a "gory" photograph of the deceased and the statement that it had been disallowed introduction into evidence not only was an attempt at inflaming the passions of the jurors, but was also again made in an effort to make

them believe that they were being deprived of important evidence (Appendix, p. 8a). Such remarks coupled with the reference to parole (Appendix, p. 5a) certainly provided the jury with a quasi moral justification for convicting the Petitioner even if they did not believe beyond a reasonable doubt that he was guilty of willful murder. This sort of calculated persuasion on the part of a prosecutor allows a jury to convict while holding doubts because they are misled into drawing inferences that if all the evidence were before them such doubts would be eliminated, and in the alternative, the defendant would never feel the full effect of their verdict, though perhaps erroneous, because of his recourse to parole. The creation of such impressions by a prosecutor—an officer of the court—goes far in diluting the standard applied in criminal cases of finding a defendant guilty only when the belief as to guilt is held beyond a reasonable doubt.

By granting the Petition for Certiorari this Court would not only have the opportunity to correct the injustice done to the Petitioner, but would also be afforded the opportunity to lay down more precise guidelines concerning prosecutorial argument. This case lends itself to review because of the calculated attempt by the prosecutor at misleading the jury and the fact that the trial judge did not see fit to even attempt to cure the false impressions and inferences created in the closing argument. We, therefore, respectfully ask this Court to grant the Petition with the firm belief that the type of prosecutorial misconduct in issue here requires the drawing of a constitutional line and the application of the doctrine set forth in *Chapman*.

II.

In the Brief in Opposition to the Petition the Commonwealth of Kentucky asserts that this Court should also not grant the Petition because the issue of the denial of the jury's request for an affidavit was not properly preserved for review. We have dealt at length with this issue in our brief and feel that we have properly shown that the Kentucky Court of Appeals was in error in not considering the merits of Petitioner's argument that he was denied the constitutional right to be present at every stage of the trial.[1]

However, the Petitioner feels that it is necessary to reply to certain portions of Respondent's argument regarding the denial of the affidavit so as to not have this Court misled as to the substance of the issue of which he seeks review. Respondent has attempted to cloud the actual issue of denial of due process of law by setting forth two erroneous propositions which unjustly bring into question defense counsel's integrity and propriety in trying to protect the rights guaranteed to his client. First, Respondent states at page 10 of its brief that the only evidence of the jury's request for the affidavit is the telephone conversation:

> "The sole evidence of this alleged request is the conversation, supposedly over the telephone, between petitioner's trial counsel and one of the jurors at petitioner's trial."

And, second, the Respondent proposes that in fact defense counsel may have never had a telephone conver-

[1] Petition for Writ of Certiorari at 18-22.

sation with Mr. McGee, the juror.[2] It is unfortunate that Respondent felt compelled to stray from the issue at hand in his over-zealous efforts in arguing the case for the Commonwealth and so maliciously attack the truth and veracity of defense counsel. Neither the trial judge in the Hearings on the Motion for New Trial (Appendix p. 15a-23a) nor the Kentucky Court of Appeals in its opinion (Appendix p. 1a-3a) ever challenged the word of defense counsel as to the existence of the telephone conversation. And, more important, there is no question that the jury requested the affidvait, for the trial judge admitted at the Hearing, Motion for New Trial, March 16, 1973 (Appendix p. 14a), that he personally had knowledge that such a request by the jury had been made:[3]

> MR. HADDAD: *I didn't know the jury had asked for the affidavit that Kenny gave.*
>
> THE COURT: *Well, they asked for the copy of the affidavit.*
>
> MR. HADDAD: I think if they asked for it they should have been entitled to have it, you know, read back to them, Judge. As I say, I didn't even know that during the deliberations that they had asked for it, or I would have raised it at that time. I didn't know it until this guy here told me. But I just throw that out because it would be another reason we didn't put in the motions and grounds for a new trial, because it came up after we had filed it. I think we've got some right sharp points in the brief. (Emphasis Added)

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[2] Brief for Respondent in Opposition at 12-14.

[3] That portion of the transcript reprinted in the Appendix in which the trial judge admitted having knowledge that the jury had requested the affidavit was cited in the Petition for Certiorari at p. 19.

Thus, by the trial judge's own admission that the jury's request had actually occurred and was within his personal knowledge he could, and in fact did, properly rule on this ground presented along with others in the Motion for New Trial (Appendix p. 15a-16a). And, in turn, because the trial court had knowledge of the request prior to overruling the Motion for New Trial and was presented with the opportunity to right the wrong by granting Petitioner a new trial, the Kentucky Court of Appeals should have made a determinative ruling on the substance of the issue.

Finally, the Respondent states that this Court should consider Kentucky's Rules of Criminal Procedure which prohibit impeaching a jury's verdict except when such a verdict is made by lot.[4] But again, the Respondent is not speaking to the issue at hand. Petitioner recognized that this rule exists in his extensive briefing of this case when it was before the Kentucky Court of Appeals. However, Petitioner does not wish to attempt to impeach the jury's verdict in bringing his petition. Rather, he raises only the issue of whether he was denied due process of law by being deprived of the right to be present at every stage of his trial.

We, therefore, respectfully ask this Court to grant the Petition for Certiorari in order to consider the questions presented by the Petitioner, not the confusing collateral issues raised by the Respondent. Petitioner sincerely believes that a resolution by this Court of the

[4] Brief for Respondent in Opposition at 14-15.

questions he has presented in the Petition would serve to promote the fair administration of criminal justice.

Respectfully submitted,

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Counsel for Petitioner

Of Counsel:
KENNY GRANTZ

SUPREME COURT, U. S.

Supreme Court, U. S.
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NOV 8 1974
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PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for a Writ of Certiorari entered on October 15, 1974 and (2) granting the Petition. As grounds for this Motion, Petitioner states the following:

The Refusal by the Bailiff to Give the Jury Requested Evidentiary Material on the Erroneous Grounds That Such Material was not in Evidence Deprived the Petitioner of the Right to an Impartial Jury

The right to a fair and impartial jury is guaranteed to the Petitioner by the Sixth and Fourteenth Amendments. This right encompasses a jury verdict based only upon evidence that has been presented in the

course of the trial. A verdict that even possibly rests on material not entered into evidence has been held improper. *Turner* v. *Louisiana*, 379 U.S. 466 (1965). The Court has thus been very cautious in keeping the grounds for verdicts restricted to the record. The problem presented in this case is that the Petitioner was not allowed to have evidence entered on his behalf presented to the jury upon their request during deliberation of their verdict. To forbid the jury to view evidence which has been properly admitted during the trial is just as prejudicial as allowing jury verdicts based on material not admitted into evidence at all.

The Petitioner was tried for the murder of one Arthur Sands. During the course of that trial the Petitioner asserted that he was acting in self-defense. The issue of the decedent's reputation for peacefulness and quietude was of paramount importance to this plea. An affidavit from an absent witness describing the violent nature of the decedent was introduced by counsel for the Petitioner. This affidavit was duly admitted into evidence by reading it to the jury in open court. The only other evidence Petitioner relied upon to support this plea was his own testimony that at the time of the incident he thought the decedent was reaching for a knife. The jury returned a verdict of guilty after a two day trial on February 27, 1973.

A juror subsequently related to counsel for the Petitioner that the jury, during the course of its deliberation, had requested this affidavit but the bailiff refused to allow them to see it on the ground that it was not in evidence. It was unclear whether the bailiff was repeating the judge's rationale or his own in stating this

particular reason for the denial. In either situation, the jury was not allowed to view the one piece of evidence supportive of the Petitioner's testimony. Moreover, they were told that the material could not be produced because it was not in evidence at all, which was not true. In this regard, the case of *Parker* v. *Gladden*, 385 U.S. 363 (1966) is especially relevant.

In *Parker*, the bailiff remarked to at least two jurors in a murder trial his opinion that the defendant was guilty. He also stated to these jurors that even if the defendant was not guilty that could be corrected on appeal. The Court held this to be reversible error because the jury was allowed to consider material which was not in evidence. The Court so ruled despite the fact that, at most, only three jurors heard the bailiff's remarks. The "official character" of the bailiff was held to "possess great weight" with the jury. The Court also noted that the jury deliberated for some 26 hours before reaching a verdict and that one juror had testified that she was indeed prejudiced by the statements. Even without such facts, it is clear that the Court would have ruled in the same manner.

> "Aside from this, we believe that the unauthorized conduct of the bailiff 'involves such a probability that prejudice will result that it is deemed inherently lacking in due process' ". 385 U.S. at p. 365.

In this case, the jury requested evidentiary matters from the bailiff. There is no spontaneous situation here such as existed in the *Parker* case: the jury asked the bailiff for a specific piece of evidence, and his response was directed only to that request. Due to his official character, the jury quite naturally accepted the ex-

planation tendered by the bailiff to the effect that such materials were not in evidence. They had thus been told. in effect, to further disregard any conclusions possibility derived from that affidavit. Surely, the jury being told that certain matters were no longer in evidence is as prejudicial as their considering matters not validly admitted into evidence at all.

The request for the affidavit was reflective of the entire jury's desire to further examine it. Thus, the bailiff's refusal was obviously communicated to all the jurors, not just two as in the *Parker* case. The entire jury was informed that this affidavit was not in evidence and therefore could not be produced for their inspection. Unlike the remarks in the *Parker* case which dealt with the bailiff's *own* impressions and opinions, the bailiff's remarks here were specifically directed to a comment on evidentiary matters presented during the trial. He clearly conveyed to the jury that as a matter of law such materials were not in evidence. Moreoever, at least one juror stated to Petitioner's counsel that if such evidence had been presented to the jury, he would very probably have held out for not guilty. As was stated in the *Parker* case, "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." 385 U.S. at p. 366.

In conclusion, the Petitioner was entitled to a fair and impartial jury at his trial. Such a jury could only be so if their verdict was based only on matters that were presented during the trial itself. The refusal of the bailiff to produce upon the jury's request a crucial piece of evidence in Petitioner's favor denied the Petitioner the right to have the jury consider all the evidence existing

in the case. Since the reasons for the denial of the request were obviously incorrect, the jury was thus led to believe that this evidence was not relevant at all since it wasn't entered. The jury could not have been impartial for they weren't allowed to view favorable evidence for the Petitioner any further thereby creating a bias in favor of the Respondent's argument. The official character of the bailiff in his relation to the jury was such that prejudice to the Petitioner was inherent in the facts here presented.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate the order, grant the petition and review the judgment and opinion below.

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Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

FRANK E. HADDAD, JR.